SUPREME COURT, U. S.
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In The

Supreme Court of the United States

October Term, 1974

No. 74-1506

DONALD M. FISHER and MELVIN P. FISHER, as Trustees under the Last Will and Testament of BERNARD FISHER, deceased, ROSLYN MILLER, BERNICE GOLD and PHILIP ADLER,

Petitioners,

v.

CITY OF SYRACUSE and SYRACUSE URBAN RENEWAL AGENCY,

Respondents.

SIDNEY BLUMAN, individually and as Executor of the Last Will and Testament of ISRAEL HURWITZ, deceased,

Petitioner,

v.

CITY OF SYRACUSE and SYRACUSE URBAN RENEWAL AGENCY,

Respondents.

SUPPLEMENTAL BRIEF FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK. FOURTH DEPARTMENT

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August 29, 1975

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Statement

The petition for a writ of certiorari in the above-entitled cases was docketed in this Court on May 29, 1975 as No. 74-1506.

The respondents served and filed their brief in opposition to the petition in June, 1975.

The instant case is now pending in this Court.

On July 28, 1975 the Supreme Court of New Jersey rendered a decision in a case entitled *Washington Market Enterprises, Inc.* v. *The City of Trenton.* On virtually an identical set of facts as those in the case at bar the New Jersey Supreme Court reached a decision diametrically opposed to the New York decision of which review is herein sought. Obviously, this decision was not available to the petitioners at the time of their last filing in this Court and, therefore, this supplemental brief is respectfully submitted pursuant to Rule 24 (5) of the Rules of this Court.

SUPPLEMENTAL ARGUMENT

In our petition herein it was conceded that there had been no "taking" in the traditional sense of the term in that in New York it had been held that, absent a physical interference with property or a legal restraint of the use thereof, there was no "taking". It was and is our contention that the impact of condemnation blight, in that it impaired the beneficial use of the property and destroyed its value, constitutes a violation of the due process guaranteed under the Fourteenth Amendment.

Since the filing of our petition and the filing of the respondents' brief in opposition the New Jersey Supreme Court decided a case — *Washington Market Enterprises, Inc.* v. *The City of Trenton* (July 28, 1975; unreported as yet) on facts which were identical with the case at bar. The Court found in favor of the property-owner on the law.

The Court stated the question before it as follows (Slip opinion, page 2):

> "This case presents the question of whether there can be a taking of property for which the Constitution demands just compensation, absent a physical invasion of the property or a direct legal restraint on its use."

In its brief the plaintiff had argued "that there has been a constructive taking under the Fourteenth Amendment of the United States Constitution." In agreeing with plaintiff's contention, the Court concluded as follows (Slip opinion, p. 3):

> "For reasons hereinafter set forth, we hold that where planning for urban redevelopment is clearly shown to have had such a severe impact as substantially to destroy the beneficial use which a landowner has made of his property, then there has been a 'taking of property' *within the meaning of that constitutional phrase.*" (Emphasis added.)

It is submitted that that is the answer that should be given to the "Question Presented" herein (Petition, pp. 2-3).

The New Jersey court observed that, although a declaration of blight does not obligate a municipality to complete fully all aspects of its renewal plan, if it abandons a project in whole or in part, it does not thereby insulate itself from the obligation to compensate in those instances where its activities have already practically destroyed the beneficial use of a particular property (Slip opinion, pp. 11-12). The court said that, while "not every impairment of value establishes a taking," it is not true "that there can be no *de facto* taking absent a physical invasion or a direct restraint on use" (Slip opinion, p. 12). The court reasoned (Slip opinion, pp. 14-15):

> "It was early held that actual appropriation or invasion might be deemed a compensable taking, although unrelated to any condemnation proceeding, * * * (citations omitted). From such cases there developed the idea of physical invasion or appropriation as the chief criterion for determining whether a 'taking' had occurred. While the physical invasion standard has proven useful in singling out those occasions where compensation should clearly be forthcoming, *it is obviously too narrow a standard to identify all instances of compensable taking.*" (Emphasis added.)

The court noted the departures from the physical invasion test in the cases dealing with direct restraints on the use of property and with the cases dealing with damage by reason of the low flight of aircraft whether directly below the flight path or proximate thereto (Slip opinion, pp. 15-18). The court considered the blight cases as yet another instance of departure from the physical invasion test. The court said (Slip opinion, pp. 18-19):

> "A declaration of blight is one of the early steps in an urban renewal project. Experience had shown that there is generally a considerable interval of time between such an announcement and the eventual acquisition — whether by purchase or condemnation — of property located in the blighted area. Occasionally, as was the case here, the project will be entirely abandoned before completion. From the time it becomes generally known that an area has been selected as the site of an urban renewal project, as we have pointed out in earlier cases cited above, there ceases to be a ready market for premises within the area. It becomes difficult to find tenants and impossible to enter into long-term leases. Upkeep, maintenance and renovation cease; the value of the property tends constantly to diminish."

The court concluded (Slip opinion, p. 22):

> "We hold that where the threat of condemnation has had such a substantial effect as to destroy the beneficial use that a landowner has made of his property, then there has been a taking of property within the meaning of the Constitution."

Although the court refused to direct the City to condemn the plaintiff's property, it remanded the case to the lower court for the factual determination of the damages.

Thus we have a determination of the New Jersey court in the cited case which is diametrically opposed to the determination of the New York court in the case at bar. In the instant proceeding we seek a writ of certiorari to review the New York deter-

mination. We understand that in the New Jersey case the defendant, the City of Trenton, is considering the advisability of applying to this Court for a writ of certiorari.

The question of law involved is arising in State after State. Wisconsin spoke first; California followed; and now comes New Jersey. It seems clear that this Court should pronounce its definitive ruling on this point, especially in view of the fact that vast Federal sums are involved in urban renewal projects throughout the country.

CONCLUSION

For the reasons stated in the petition and in this supplemental brief, a writ of certiorari should issue to review the judgment and opinion of the Appellate Division of the Supreme Court of the State of New York, Fourth Department.

Respectfully submitted,

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